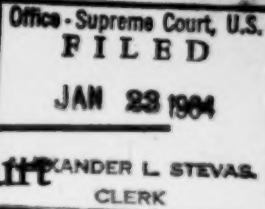


83-1203

No.



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

IAN T. ALLISON and FRED K. AUSTIN,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

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January, 1984

QUESTIONS PRESENTED

1. Can a U.S. District Court grant, and a U.S. Court of Appeals uphold, a Motion for Summary Judgment in favor of the SEC and against Petitioners, when there are numerous factual and legal issues in dispute between the parties, including (1) the issue as to the degree of scienter that is required to be proven by the SEC to show market manipulation, and (2) whether or not the SEC has met its burden of proof?
2. Is it a violation of Due Process and an abuse of discretion for a U.S. District Court to grant a Summary Judgment Motion in favor of the SEC and against two Petitioners, when only one of said Petitioners has testified at a hearing on a Motion for a Preliminary Injunction, when none of the witnesses to whom alleged omissions were made by Petitioners have testified, and when Petitioners were not informed by the District Court that it was going to simultaneously rule on a pending Motion for Summary Judgment at the close of testimony in a Preliminary Injunction hearing?

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**PETITION FOR A WRIT OF CERTIORARI
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SUMMARY OF CASE

Petitioners/Appellants Ian T. Allison and Fred K. Austin, hereby respectfully pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit (California), to review the judgment entered against them in that court on October 24, 1983, in case No. 82-3305, D.C. No. 81-435-BE, entitled, *Securities and Exchange Commission v. Ian T. Allison, et al.*

Although the Ninth Circuit has remanded this matter so that the penalty to the defendants can be slightly modified, no action has occurred to date except that the SEC has requested that the Ninth Circuit publish its decision (this letter appears as Appendix "A").

The opinions of the above-cited District and Appellate court cases are incorporated herein by reference and appear as Appendix "B" of this Petition.

The jurisdiction of the U.S. Supreme Court to review the above decisions is invoked under 28 U.S.C. Section 1254(1); 15 U.S.C. Section 77(v); 15 U.S.C. Section 78(aa).

This Petition for a Writ of Certiorari is based upon:

(1) a *violation* of defendants' constitutional right of due process in that they were denied an opportunity to rebut the assertions of the SEC in their summary judgment motion and thereby to refute SEC's claims that there are no legal and factual issues in dispute between the parties.

(2) *error*-in that the court granted plaintiff's summary judgment motion when there were clearly numerous factual and legal issues in dispute between the parties, not the least of which is the issue of scienter.

Guarding and preserving the constitutional right of due process is as important in the American business context as it is in the penal context. The latter protects the individual from abuses of a system. But at stake in the former is the entire American business community and the economic strength of our nation.

STATEMENT OF THE CASE AND FACTS CASE

The Securities and Exchange Commission instituted this action for injunctive and other equitable relief on May 18, 1981, (RE 19-22), alleging that these two Petitioners, and other defendants, had violated the Federal Securities laws in connection with an initial offering of 700,000 shares of common stock in Pabagold, Inc., a company that was marketing a new suntan lotion called "Pabatan". The laws allegedly violated by Petitioners were the anti-fraud provisions of the 1933 Securities Act (Section 17(a)(1) and (3); and the 1934 Securities Exchange Act (Section 10(b), Section 9(a)(2)) and 17 C.F.R. Section 240, Rule 10(b)-5(b); and for violations of the Securities Registration Laws, Sections 2(11), and 5(a) and (c) of the 1933 Securities Act. Later, the SEC's charges of violation of the registration laws were dropped.

Subsequent to entry of a Temporary Restraining Order against the Petitioners herein and other defendants, evidentiary hearings were held on the SEC's Motion for a Preliminary Injunction on May 28, and September 15 and 16, 1981. Meanwhile, on August 17, 1981, the SEC filed a Motion for Summary Judgment with a supporting memorandum and statement of undisputed materials facts. (RE 23) When the Petitioners herein could not respond to said Summary Judgment Motion within the ten days allowed by law, the SEC applied for an Order entering a Preliminary Injunction without further hearings. (CR 116) The District Court declined to enter such an Order, but granted Petitioners herein and their co-defendants further time within which to respond to the SEC's Motion for Summary Judgment. On September 14, 1981, Petitioners filed a Memorandum (with attached affidavits) in Opposition to the Motion for Summary Judgment. In the following two days, testimony was given by petitioner Ian T. Allison and other witnesses at the District Court hearing on the

Motion for Preliminary Injunction. After said hearings were completed, and during the period of time briefs were being submitted on the Preliminary Injunction Motion by all parties on the legal issues, the SEC filed a Motion to Renew its Motion for Summary Judgment on October 13, 1981. (CR 140) Since there was already a Motion for Summary Judgment pending in the court; Petitioners herein did understand and did not separately respond to this new Motion for Renewal of the Motion. However, after oral argument on the SEC's Motion for Preliminary Injunction on December 17, 1981, the District Court entered its Opinion and Final Judgment, granting the SEC its Motion for Summary Judgment, apparently subsumed therunder its decision on the SEC's Motion for Preliminary Injunction. (RE 248, 270)

In other words, Petitioners herein believed that when Petitioner Allison was giving testimony on September 15 and 16, 1981, that that testimony was going only to the Motion for a Preliminary Injunction. Petitioners were told directly by the Court at the outset of the hearing that it was not taking evidence on the Summary Judgment Motion at that time, and that the Court was almost certainly going to deny the Summary Judgment Motion in any case. (TR, Preliminary Injunction, Volume 1, page 29, lines 8 through 12) Despite this statement, the Court thereafter granted the Summary Judgment in favor of the SEC.

Petitioners and other defendants filed a timely Notice of Appeal in the U.S. Court of Appeals for the 9th Circuit and after briefs and reply briefs were filed in that appeal, the Appellate Court entered its Judgment upholding the SEC's Motion for Summary Judgment on October 24, 1983.

This Petition for Writ of Certiorari is brought by two of the Petitioners on the basis that the lower courts improperly resolved material and disputed issues of fact and law, thereby depriving said Petitioners of their right to an

evidentiary trial, and violated Due Process by misleading the Petitioners into not presenting testimony and other evidence available to them to counter the Motion for Summary Judgment.

FACTS

Mr. Allison became licensed as a Public Accountant by the State of California in 1953 and developed a successful practice in the lumber industry. His practice was sold in 1956 to Yergan and Meyer, CPA's of Portland, Oregon. He formed Lumbermans Acceptance Company in 1957, which subsequently became a publicly trading company, registered with the Securities and Exchange Commission as a 12(g) company and listed on the NASDAQ exchange under "LUMB". Through fraudulent activities of a major bank, Lumbermans Acceptance Company was forced into Chapter XI of the Bankruptcy Act, but after five years of litigation, a Sonoma County jury awarded Lumbermans Acceptance Company a 7 Million Dollar judgment against the fraudulent bank. This judgment included \$1,000,000 to Mr. Allison personally for the damages he sustained to his reputation. Lumbermans Acceptance Company emerged from Chapter XI and has subsequently merged with a \$15,000,000 re-organized company.

Petitioner, Fred K. Austin, is the stepson of Ian T. Allison. After working for the U.S. Dept. of Agriculture for 12 years, Mr. Austin entered business as the manager of the Loomis Wine Cellars, a subsidiary of Lumbermans Acceptance Company. From 1970, Mr. Austin worked as a licensed real estate salesman for Lumbermans Mortgage Company.

Allison first learned about a new, remarkable suntan lotion, called "Hawaiian Gold Pabatan", from his stepson Fred K. Austin. (RT 9/15/81, page 278) Allison tried the Pabatan product while he was on a trip in Mexico and was

very favorably impressed with its effectiveness. Also, Allison was acquainted with Steven Wells, the current president of Pabagold, Inc., the company that produces Pabatan in Hawaii, and he had great respect for Mr. Wells' managerial abilities. (RT 9/15/81, page 292, and page 315-316) In addition, Allison himself has some 20 years experience in providing financing for new products. (RT 9/15/81, page 290-291) On the basis of his expert analysis of Pabatan's market ability, and of the financial reliability of Pabagold, Inc., Allison was convinced of its desirability for investment purposes. (RT 9/15/81, page 315-319) Moreover, Allison was favorably impressed with the fact that Paulson & Company, a brokerage house of high repute in Portland, Oregon, was providing a firm underwriting and that Pabagold, Inc. had retained a Big Eight accounting firm. (RT 9/15/81, pages 293-294, page 321-322) Accordingly, Allison considered Pabagold, Inc. to be a sound business prospect with potential for substantial growth. (RT 9/15/81, pages 290-294, pages 315-316)

As a result of his business activities in South America, Allison had earned the confidence of a number of business corporations there. (RT-9/15/81, pp. 312-314) He sometimes advised them regarding investment opportunities, and held their powers of attorney for investment purposes. (Ex. 63, 64 [Films Unlimited], Ex. 73, 74 [Petrochem Trading Corp.], Ex. 78, 79 [Contact Corp.], Ex. 84, 85 [Astor Trading Corp.], and Ex. 89, 90 [International Disel Co., Inc.], Allison recommended Pabagold, Inc. stock to some of those companies, as well as to International Minerals, S.A. and the Missionary Society, and suggested that they buy Pabagold, Inc. through their own banks or brokerage firms in South America. (RT-9/15/81, pp. 317-318, 323, 335-336) Ultimately, however, the underwriter, Paulson Investment Co., declined to sell to foreign buyers in their own names or through their banks. (RT-9/15/81, pp. 318-319)

Paulson then decided to sell Pabagold only to residents of states in which the stock had been blue-skyed. (RT-

9/15/81, pp. 318-319) Thus, neither the companies nor Allison (a resident of California) were eligible to buy in their own names. (RT-9/15/81, p. 319) Allison therefore arranged for attorney/agents in blue sky states to make purchases on behalf of the companies and the Missionary Society. (RT-9/15/81, pp. 318-322) During oral argument on the appeal of the District Court decision in this case, on June 14, 1983, counsel for the SEC, upon being questioned by Judge Boochever, admitted that where stock must be sold to residents of a certain state, that to use an agent to buy it when one is a non-resident, is *not* improper. (Transcript of oral argument, 6/14/83, p. 17, lines 11-16)

On the basis of his experience, Allison expected Paulson and Co. to apportion the stock among potential purchasers. (RT-9/15/81, pp. 320-322) He was also aware of Paulson's large interstate sales force, and of the fact that 500 offering circulars had been printed. (RT-9/15/81, p. 322) He therefore arranged for seven attorneys in blue sky states to offer to buy 100,000 shares apiece; his expectation was that through apportionment, if they were lucky, they would obtain perhaps 25,000 shares each. Contrary to Allison's expectations, however, and to his complete surprise, the attorney/agents were sold the entire offering of 700,000 shares. (RT-9/15/81, p. 322)

The attorneys were retained through appellant International Sales, Ltd. which is a d/b/a for Fred K. Austin. (RT-9/15/81, pp. 335-336, 339) International Sales served as an agent for the transmission of funds, on behalf of the companies and the Missionary Society.

Allison and Austin told four close friends about their hopes for Pabagold, Inc. (RT-9/15/81, pp. 323, 378-382, 385) Allison urged these friends to not pass the information on to other people. Those four friends, and a very large number of other people, later bought stock.

RT-9/15/81, pp. 335-36, 339; RT-9/16/81, pp. 394-96;
Ex. 49, 67 (International Sales instructions on behalf

of Films United), Ex. 44, 68 (International Sales instructions on behalf of International Minerals), Ex. 72 (International Sales instructions on behalf of the Missionary Society), Ex. 51, 52 and 76 (International Sales instructions on behalf of Petrochem Trading Corp.), Ex. 36, 83 (International Sales instructions on behalf of Contact Corp.), Ex. 3, 87 (International Sales instructions on behalf of Astor Trading Corp.), and Ex. 35, 92 (International Sales instructions on behalf of International Diesel Co., Inc.).

See Ex. 31, 32 (Schedules of trading in Pabagold stock prepared by Paulson and Aldo Kasari, a Commission employee) and Ex. E (schedule of trading prepared by defendants). The schedules reflect a total of 51 trades within a period of six days. Seven were sales by the attorney-agents on behalf of the defendants. Five more related to three persons to whom Allison admittedly spoke; Austin spoke to one additional party. The remaining 38 trades were by persons unknown to Allison or Austin. See also Ex. 61 (affidavit of Allison).

Also, the underwriter took a short position in the stock, making a market, which then increased substantially the stock's value. (RT-9/15/81, pp. 305-310; RT-9/16/81, p. 376)

Petitioners Allison and Austin have no personal financial interest whatsoever in Pabagold, Inc., or in its stock, or in any of the South American company defendants, or in the Missionary Society.

REASONS FOR GRANTING THE WRIT

I

THE DRASTIC REMEDY OF SUMMARY JUDGMENT CANNOT BE GRANTED UNLESS ALL REASONABLE INFERENCES OF THE EVIDENCE PRESENTED IN A LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY ARE INSUFFICIENT TO OUTWEIGH THE EVIDENCE PRESENTED BY THE MOVING PARTY, AND THE COURT IS NOT ALLOWED TO RESOLVE ISSUES OF DISPUTED FACTS

"In unusually complex cases involving witness credibility, motive, intent, and complicated facts, summary judgment should not be entered unless the movant has shown there is not the slightest doubt as to the factual dispute." *Chicago & NW Ry. Company v. Hosper Packing Company, Inc.*, 363 F. Supp. 697.

The Ninth Circuit has recognized the "drastic nature" of the Summary Judgment remedy. *Mutual Fund Investors, Inc. v. Putnam Management Company, Inc.*, 553 F.2d 620, 624 (9th Cir. 1977). The Second Circuit has also characterized the Summary Judgment as a "drastic device." *Gladston v. Firemans Fund Insurance Company*, 536 F.2d 1403, 1406 (2nd Cir. 1976). The Eighth Circuit has similarly called it an "extreme and treacherous remedy", which should not be entered unless the movant has established its right "with such clarity as to leave no room for controversy", and unless the other party is not entitled to prevail "under any discernible circumstance." *Vette Company v. Aetna Casualty and Surety Company*, 612 F.2d 1076, 1077 (8th Cir. 1980).

If there is even the slightest doubt as to whether the non-moving party can develop an issue for the trier of fact, a Summary Judgment must be denied. *Dolgow v. Anderson*, 438 F.2d 825, 830 (2nd Cir. 1970). In fact, the

requirements for Summary Judgment are perhaps "even more stringent than those involved in the assessment of actual evidence on motions for a directed verdict." *Char-bonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979).

Underlying these stringent requirements is the judicial concern that Summary Judgment can deprive a party of his/her constitutional rights to a plenary trial and to due process of law. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467 (1962); *Heyman v. Commerce and Industry Insurance Company*, 524 F.2d 1317, 1320 (2nd Cir. 1975). The Ninth Circuit has echoed those constitutional concerns, holding that a "genuine issue supporting a claimed factual dispute requires a judge or a jury to resolve the parties' differing versions of the truth at trial." *Mutual Fund Investors v. Putnam Management Company, Inc.*, 553 F.2d at 624.

The non-moving party must of course be afforded a "full and fair opportunity" to meet the proposition that there is no genuine issue of fact. *Ithaca College v. The N.L.R.B.*, 623 F.2d 224, 229 (2nd Cir. 1980). In the present case, the Petitioners were seriously misled at the outset of their hearing on the Preliminary Injunction in the District Court, because the trial judge announced that there was not much sense in "wasting a lot of time" on the Motion for Summary Judgment because "I'm probably not going to allow it anyway." (RT-9/15/81, p. 29) The Petitioners thought that they were giving testimony to determine the validity of a Preliminary Injunction, and had no idea that the judge was going to use the same testimony to rule on a Summary Judgment Motion. In fact, several important defense witnesses were not even present at those evidentiary hearings. Petitioners herein were denied their constitutional right to a full trial of the facts.

In addition, no answer at all is required to an insufficient showing by the moving party to a summary judgment motion. *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980); *Neely v. St. Paul Fire and Marine Insurance Company*, 584 F.2d 341, 344 (9th Cir. 1979); *Mutual Fund Investors, Inc. v. Putnam Management Company, Inc.*, 553 F.2d 620, 625 (9th Cir. 1977). In the present case, the SEC prevailed on the Motion only because all inferences were favorable to it (the movant), and on strictly circumstantial and ambiguous evidence. Its showing was insufficient on its face without said favorable inferences to even require an answer from Petitioners.

But even assuming Petitioners had an obligation to answer, "All inferences that can be drawn from the evidence on file must be viewed in a light most favorable to the party opposing summary judgment." *Spectrum Financial Companies v. Marconsult, Inc.*, 608 F.2d 377, 380 (9th Cir. 1980), citing *United States v. Diebold, Inc.*, 369 U.S. 654, (1962). The non-moving party is entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn on his behalf, and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered." *Charbonnages de France v. Smith*, 597 F.2d at 414. It follows, therefore, that a lower court cannot preempt the plenary trial by passing upon matters of credibility or by otherwise weighing the evidence in ruling on a Summary Judgment. *Pepper and Tanner, Inc. v. Shamrock Broadcasting, Inc.*, 563 F.2d 391, 393 (9th Cir. 1977); *Neely v. St. Paul Fire and Marine Insurance Company*, 584 F.2d 341, 344 (9th Cir. 1978). Unfortunately, that is precisely what the lower court did in the present case.

II

THE LOWER COURTS ERRED BY RESOLVING MATERIAL AND DISPUTED ISSUES OF FACT, BY DRAWING INFERENCES FAVORABLE ONLY TO THE MOVING PARTY, AND BY IGNORING THE TOTAL LACK OF EVIDENCE PRESENTED BY THE MOVING PARTY (SEC) TO SUPPORT ITS MOTION

Originally, Petitioners were charged by the SEC with violations of the anti-fraud, anti-manipulative, and registration rules of the Securities Acts of 1933 and 1934. Later, the charges of violations of the registration rules were dismissed, but Petitioners were specifically charged with violating Section 17(a)(1) & (3) of the 1933 Act (anti-fraud) and Section 9A(a)(2), Section 10(b), and Rule 10(b)-5(b) of the 1934 Act (anti-manipulation rules). While the anti-manipulation rules of the 1934 Act impose a higher burden of proof upon plaintiff alleging violations of those rules than the anti-fraud provisions of the 1933 Act, Plaintiff SEC herein did not even prove the required elements to show fraud under the 1933 Act in the present case.

The word "manipulative" is a term of art when used in connection with securities markets. It connotes *intentional or willful conduct* designed to deceive or defraud investors by controlling or artificially affecting the price of securities. *Ernst & Ernst v. Hotchfelder*, 425 U.S. 185, 199 (1976). The SEC is required to establish scienter as an element of a civil enforcement action to stop violations of Section 10(b) and Rule 10(b)-5 of the 1934 Act, and Section 17(a)(1) of the 1933 Act. Section 10(b)'s terms clearly refer to "knowing and intentional misconduct." Section 17(a)(1)'s language evidences intent by congress to prescribe only knowing or intentional misconduct. *Aaron v. SEC*, 446 U.S. 680, 690-691, 695-697, and 701-702 (1980).

Even under the lower standards of Rule 10(b)-5, misrepresentation requires that the defendant made false representations of material facts with scienter upon which

the plaintiff justifiably relied to his detriment. *Zobrist v. Coal-X*, 708 F.2d 1511, 1516 (Utah, 1983). A mere assertion (by a plaintiff) that wrongful statements were made without more is wholly insufficient to support a claim of fraud. *Juster v. Rothschild*, 554 F.Supp. 331, 334 (New York, 1983).

Absent any evidence that a Defendant's alleged "misrepresentations" actually deceived a plaintiff, a claim under section 10(b) must fail. Also, there is no duty to disclose information to one who reasonably should already have been aware of it, and, there can be no fraud action under any of the SEC statutes without proof of damages sustained by the plaintiff. *E.F. Hutton Company v. Peham*, 547 F.Supp. 1286, 1294-1296, (New York 1982). While silence may operate as a fraud in violation of Rule 10(b)-5, such liability is premised upon a *duty to disclose* arising from a relationship of trust and confidence between parties to a transaction. *Chiarella v. U.S.*, 100 S.Ct. 1108, 1115, (1980).

In the present case, District Court Judge Belloni acknowledged the importance of the SEC's need to prove the Petitioners' scienter when he stated: "As a general rule, Summary Judgment is not favored in complex litigation, particularly where, as in significant parts of this case, the issue of scienter or intent is important." (D.C. Transcript 1/18/82, p. 9, lines 1-5). The judge went on: "To prevail on a claim of fraudulent manipulation under Section 10(b), Rule 10(b)-5, and Section 17(a)(1), the SEC must prove two principle elements: manipulation and scienter." (D.C. Transcript, p. 10, lines 24-27).

It is clear from an examination of the transcripts in this case that the SEC did not prove either element, and the Court chose to resolve all the ambiguous issues of witness credibility, scienter and intent of the Petitioners herein in favor of the moving party (SEC), contrary to

all settled case law. As to these two Petitioners, the only evidence brought against them by the SEC on fraud charges was that they "omitted" to reveal certain information to the underwriting firm (Paulson and Co.), to their lawyer-agents who purchased the stock in question, and to the four close friends whom they told about this exciting new business prospect.

However, Chester Paulson, President of Paulson and Co. underwriting firm, admitted that he knew in advance that all of the stock was going to be purchased by seven persons, all connected to Defendant Abe Weiner, and he had good reason to know that all stock was being purchased by the same financial source. (RT 9/10/81 p. 49, 54) As an experienced underwriter in the business, Paulson certainly was not deceived as to the fact that the seven offers were coming from the same source.

Since the underwriter was clearly aware of the nature of the transaction, Petitioners had no duty to disclose anything further. Likewise, the attorney-agents who purchased the stock on behalf of the foreign corporations were clearly aware of the legality of the purchases they anticipated making and demonstrated no suspicions of the circumstances surrounding those purchases. (i.e., RT 5/28/81 Vandenberg p. 87) And the Petitioners' four close friends had full information as to the Petitioners' involvement in the offering (RT 9/16/81 vol. III, p. 372, l. 10- p. 374)

But Petitioners were denied an opportunity to prove this fact in that they were lulled by the court into believing the procedure was a hearing on a preliminary injunction when in fact it was a hearing on the SEC's motion for summary judgment. Consequently, the Petitioners did not go to the proceeding prepared to prove they had no duty to further disclose. Had Petitioners been on notice, they would have produced these witnesses to prove that the duty to disclose was a triable issue of material fact in dispute.

Finally, the SEC's contention that Petitioners had a duty to disclose is vague and ambiguous. Clearly Petitioners understand there is a duty to disclose and in fact complied with that requirement. The question is How Much Is Enough? No where in the proceedings has the SEC indicated the quantity or the quality of disclosure required by Petitioners to be in compliance with SEC regulations, and nowhere in the proceedings did the SEC show that Petitioners failed to meet that quantitative standard. Furthermore if Petitioners had been able to bring in these witnesses, the Plaintiff SEC's bare-faced assertions of "misrepresentation by omission" on the part of these Petitioners would have been completely controverted. As it was, the SEC was allowed to prove this issue with mere assertions, and without presenting *any* substantiating evidence to support them.

While Petitioners here admit that scienter in a 10(b)-5 case can be proven merely by showing "knowing conduct" on the part of defendants, the preponderance of evidence test to which the District Court in the present case adhered, has been allowed *only in cases where there is a full trial on the merits*. In the present case, not only did Petitioners *not* have a full evidentiary hearing in opposition to the plaintiff's Summary Judgment Motion, but what evidence they were able to bring in on the Preliminary Injunction hearing was adversely weighed or completely ignored by the court! (See Petitioner Allison's assertion of innocence negating scienter, RT 9/15/81, vol. III, p. 389-390, l. 4)

The present case involves complex issues, including the materiality of alleged omissions made by Petitioners, their alleged scienter in committing the acts, and their duty to disclose. Petitioner Allison put these issues in dispute in his testimony at the Preliminary Injunction hearing. The Court then proceeded to disregard or weigh that evidence, and to draw all inferences in favor of the moving party

(SEC), in total contradiction to law. Therefore, the lower courts erred in granting and upholding the Summary Judgment Motion.

III

PETITIONERS WERE DENIED DUE PROCESS BY THE DISTRICT COURT IN THAT THEY WERE DENIED AN OPPORTUNITY TO PRESENT FACTS AT THEIR DISPOSAL TO OPPOSE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provide for a hearing on a Summary Judgment Motion. The SEC's motions for a Preliminary Injunction, and a Summary Judgment, were set for hearing at the same time in this case. At the beginning of the hearing, the District Court Judge, Judge Belloni, clearly indicated that he was not likely to grant the Summary Judgment Motion. The Judge stated: "I don't see much sense right now in wasting a lot of time on this Motion for Summary Judgment because I'm probably not going to allow it anyway . . . It would delay the evidentiary hearing (on the Preliminary Injunction Motion)." (parenthetical notation added) (Hearing transcript, September 15, 1981, Volume 1, page 29, lines 8-11). Petitioners then proceeded to provide testamentary evidence which they thought was being given strictly in opposition to the SEC's Motion for a Preliminary Injunction. Months later, after the briefs were in, Judge Belloni proceeded to enter both a Summary Judgment and a Permanent Injunction against these Petitioners, despite the fact that Petitioners were precluded from introducing evidence in their favor on the Summary Judgment Motion. This decision by the judge was clearly an abuse of discretion, a violation of Rule 56(c) of the Federal Rules, and a gross violation of due process under the U.S. Constitution.

IV

THE SOCIAL IMPORTANCE OF REGULATION BY PROSECUTION IN VIOLATION OF DUE PROCESS EXTENDS FAR BEYOND THE PARTICULAR FACTS HEREIN PRESENTED

In the present case the lower courts have upheld a judgment of market manipulation in spite of the fact that the government did not prove nor even attempt to prove, that the petitioners had a financial interest in, or profit from, the stock transactions at issue. Nor did the government prove that the petitioners had manipulative or criminal intent when they accidentally found themselves in the position of being agents of controlling shares of a corporation that was about to market a new product.

The lower courts have sustained a judgment against the petitioners essentially because: 1. the petitioners did not disclose the fact that they used intermediaries when purchasing the stock; and 2. the price of the stock went up. The lower courts have chosen to ignore petitioner Allison's testimony, which clearly indicates that his actions, both in the manner in which he obtained the stock and the manner in which he sold a portion of it, were no more than actions which may have been taken by any prudent businessman. At a trial, the trier of fact would have had the option to disregard or disbelieve this testimony. For a summary judgment, however, the court had no such authority. The result of the decisions in this case is that men have been penalized for acting as prudent experienced businessmen.

The chilling effect on the efficiency of our free market system becomes even more obvious when the intent and procedures of the Securities and Exchange Commission is examined. An insight into the SEC is provided by former SEC Commissioner, Roberta S. Karmel, in her book, *Regulation by Prosecution* (Simon and Schuster, N.W. 1982).

"One of the most serious problems in law enforcement today is a general disrespect for the law. My personal concern with jurisdiction is a concern with what I see as one of the root causes for that disrespect, particularly in the area of white collar crime. In too many instances, the government has been too expansive in asserting its authority to prohibit or prosecute activities that a large number of people do not believe are wrong, or at least sufficiently wrong to be illegal . . . At the same time, the Commission has been too lax in enforcing clear legal requirements, for example, the timely filing of financial reports . . . My basic criticism of the SEC's enforcement program is that it lacks standards for the initiation and prosecution of cases. Investigations and enforcement actions are begun and maintained out of an emotional reaction to particular factual situations, rather than pursuant to policy programs developed at the Commission level. . . . It is therefore not surprising that the Commission has been criticized and portrayed as a power-hungry prosecutor seeking to constantly expand its jurisdiction, *without paying sufficient attention to due process and other legal safeguards.* . . . However, because of its intransigent refusal to formulate and publicize legal standards in its enforcement programs and its inability—sometimes justifiable—to always prove the facts it suspects, the Commission often appears to be arbitrary and capricious in the way it selects, prosecutes and settles cases. While to some degree confidentiality and flexibility are necessary ingredients of a good law enforcement program, when such a program becomes the primary instrument for developing and promulgating regulatory policy, a sound and express articulation of legal standards is required. . . . Over the long term, much needs to be done by the Commission to justify its enforcement programs and to

articulate the legal standards utilized in making decisions to investigate, prosecute and settle cases. . . . I feel that the Commission's reputation and competence as a law enforcement agency has been compromised by the excessive reliance on prosecution as a policy instrument and publicity as a sanction. . . . Further, the courage to close a case involving suspected fraud either because the staff had been unable to develop adequate, legally probative and admissible evidence, or because the facts, however raw, did not add up to a violation of the federal securities laws, was rare. But to my way of thinking, this is exactly what a government of laws *is supposed to do.*" (pp. 189, 220-224)

The instant case is a perfect example of the extreme over-regulating and "regulation by prosecution" engaged in by the SEC. In this case, the SEC has succeeded in having mere prudent business actions labeled as manipulation at the summary judgment level. The result is that this case has provided the SEC a new arsenal of awesome power. Power which even the SEC has acknowledged is new and unprecedented.

The Ninth Circuit felt that no new law had been created and that this case was not sufficiently important enough to allow publication of its opinion, but, the SEC, clearly aware of a new and devastating weapon to be used against American business, almost within their grasp, now scrambles to acquire it.

The Enforcement Division of the SEC, by virtue of its authority to "protect the investing public" has become an arm of the government, moving with almost unrestrained fanatical motivation.

This court has recognized the fact that the individual criminal defendant can easily be denied justice as a result of the public's negative emotional reactions and predis-

posed judgments. Yet, to date, this court has failed to recognize the fact.

Today's businessman suffers the consequences from the same negative predisposed judgments. The public (and many times, the courts) seem to have adopted a belief that all successful businessmen must be crooks. In recent decisions, this court has initiated the process of protecting business from over-regulation. However, business and the American businessman is so impeded by regulations which have never even been proven beneficial, that great strides must be undertaken by this court to relieve the burden which drives business away from this country.

The SEC, aware of this emotional climate, uses it efficiently and with devastating results while everyone suffers from an economy impeded by the continued restrictions on every aspect.

CONCLUSION

In the instant case, the SEC failed to present sufficient probative evidence to show any violation of Federal Securities laws, but the Courts were convinced in this marginal case to draw all inferences in favor of the SEC (the moving party on a Summary Judgment Motion) in violation of Rule 56(c) and constitutional Due Process to rule against Petitioners. The lower court's decision must be reversed, and this case remanded for a trial on the merits.

Respectfully submitted,

LOIS JEANNE WISE
Attorney for Petitioners

(Appendices follow)

Appendix A

In The United States District Court For The District Of Oregon

Civil No. 81-435-BE

Securities and Exchange Commission,
Plaintiff,

vs.

Ian T. Allison, Fred K. Austin, Abe Weiner,
International Sales, Ltd., International Minerals, S.A.,
Films Unlimited Corporation, Astor Trading Corp.,
Contact Corp., International Diesel Corp.,
Asociacion Misionera Mundial, and
Petro Chem Trading Corp.,
Defendants.

OPINION

[Filed Jan. 18, 1982]

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BELLONI, Judge:

INTRODUCTION

This is an action for securities fraud and for violations of federal securities registration requirements. In it the Securities Exchange Commission (SEC) brings suit against three individuals, an unincorporated business, five Panamanian corporations, a Cayman Islands corporation, and a Panamanian religious society. The agency alleges the defendants attempted to purchase the entire offering of a new stock so as to create an artificially high price. The agency alleges that defendants did this through misrepresentations and by failure to abide by federal securities requirements.

The case was filed in April 1981. Immediately the SEC sought a temporary restraining order against the defendants. The motion was granted. The SEC then moved for a preliminary injunction. A hearing on the motion began in May but could not be completed at the time. Testimony was completed in September. After further briefing, final arguments were submitted in December.

In the intervening months the parties filed several discovery motions. In addition, in September the SEC moved for summary judgment against all the defendants. Defendants, somewhat tardily, filed a motion to dismiss. Finally, some evidentiary questions were raised in the preliminary injunction proceedings.

Since there are no material factual disputes and since the various issues can be disposed of as a matter of law summary judgment will be granted in favor of the plaintiff in part and in favor of the defendants in part. Any other motion not rendered moot by this ruling will be discussed in the following opinion.

FACTS

Pabagold, Inc. is a Delaware corporation that is engaged in the marketing of a suntan lotion in the continental United States. It is a new company, incorporated in December 1980. In order to raise funds for its operations, Pabagold decided to sell some stock.

Pabagold hired Paulson Investment Co. to act as underwriter for the sale. Paulson was introduced to Pabagold by defendant Abe Weiner, who was acquainted with members of both businesses. Weiner, in fact, offered to help in the sale of Pabagold stock by providing "leads," names of potential buyers.

Pabagold made the necessary filings with the SEC to sell 700,000 of the company's common stock at \$.50 per share. Pabagold desired to sell the stock under Regulation A, which exempts small offerings from normally extensive registration requirements and substitutes a requirement that an offering circular simply accompany each sale of stock.

The Company filed a proposed offering circular with the SEC. The circular stated the amount and price of the stock and the underwriter of the sale. The circular also contained a warning that Pabagold was in a development stage, so investment in the company would be a risky venture. To this general statement the circular provided specific enumeration of the risks to the Pabagold investor. For example, the company relied on a single supplier for its product, the product has never been marketed in the continental United States, the officers and directors were inexperienced, the company had no current sales or earnings, the market for the product exists for only four months each year, and the

prospect of developing a ready market in the stock was highly unlikely.

Despite Pabagold's warnings, defendant Ian Allison, longtime friend and sometime business associate of Abe Weiner, became interested in the Pabagold offering. At the time, Allison acted with very broad powers of attorney for five Panamanian corporations.¹ He also acted as an agent for a Cayman Island corporation. He decided to purchase some Pabagold shares for these foreign businesses.

On March 19, 1981 Allison and his stepson, defendant Fred Austin, sent Paulson Investment a cashier's check for \$50,000 to be used in purchasing 100,000 shares of Pabagold stock for a number of Panamanian persons, who were named on an accompanying list. The list also contained a note that the stocks were to be held by Weiner.

The next day, Allison flew to Reno, Nevada and employed attorney Richard Horton to purchase 100,000 shares of Pabagold for Astor Trading, one of the Panamanian corporations Allison represented. Allison told Horton to purchase the stocks in a local bank's nominee name, to sell the stock when advised to, and to remit the proceeds to International Sales Ltd. International Sales, a defendant in this case, is not a separate corporation but a dba for Fred Ausin's business activities. To effect the purchase, Allison gave Horton a cashier's check for \$50,000.

¹Allison's powers were absolute. He could sign any document, transfer securities, and "do every kind of business of what nature of kind soever" for the corporations without review by the principals.

The same day, Allison, representing himself as comptroller of International Sales, employed another Reno attorney, Eric Richards, to purchase 100,000 shares of Pabagold stock. Richards's instructions were the same: purchase in a local bank's nominee name, sell when advised to do so, and remit all proceeds to International Sales. This time the stock was to be purchased for Films Unlimited, another Panamanian corporation Allison represented. Once again, to effect the purchase, Allison provided a \$50,000 cashier's check.*

At approximately the same time, Allison advised Petro Chem Trading Corp., another of the Panamanian corporate defendants, to purchase 100,000 shares of Pabagold through either Merrill Lynch, Pierce, Fenner and Smith, Inc. or the company's local bank. Shortly thereafter, the Buenos Aires branch of Merrill Lynch placed an order for 100,000 shares of Pabagold and forwarded \$50,000 to its Portland branch for delivery to Paulson Investment.

Allison and Austin then arranged for three Cayman Island banks to each place orders for 100,000 shares of Pabagold for International Diesel, International Minerals, and Asociacion Misionera Mundial. The first is a Panamanian corporation Allison represents. The second is a Cayman Island corporation of which Austin was president

*This check was drawn on Barclays Bank, payable to Films Unlimited. It was, however, endorsed over to Richards by Allison. In endorsing, Allison did not sign his own name, but instead that of "Edward L. Herrera," secretary of Films Unlimited. Allison admitted signing Herrera's name. Doing so was allowed by virtue of his powers of attorney.

Defendants contest the admissibility of this document. However the objections are without foundation. Indeed, Allison himself offered the check as an exhibit and authenticated it at his deposition.

and Allison was an agent. The last is a Panamanian religious society of which Allison is president. All three are defendants in this case. Shortly thereafter, a broker in New York placed the orders with Paulson Investment on behalf of the Cayman Island banks.

All of this activity, resulting in purchase orders for all 700,000 shares, occurred before Paulson Investment ever distributed its offering circulars. Since this threatened the legality of the purchases under Regulation A, Paulson contacted the SEC, suspended the offering, and returned all proceeds.

After a brief investigation by the SEC, Paulson prepared again to market the Pabagold stock. This time, however, the underwriter decided to sell only in blue-skyed states, where special state securities laws applied. On April 3 Weiner was advised of this. He, in turn, explained the procedure to Allison. Weiner also, at Allison's request, picked up and delivered 50 preliminary offering circulars.

Allison and Austin then proceeded to purchase the entire lot of Pabagold shares on behalf of the foreign defendants, this time through different means. They hired attorneys in blue-skyed states to purchase the stock in their own names on behalf of the foreign corporations.

On April 7 Allison and Austin, acting as representatives of International Sales, hired Portland attorney John Higgins to purchase 100,000 shares of Pabagold stock in his own name on behalf of International Minerals. Higgins was provided with a \$50,000 cashier's check to make the purchase.

The same day, Allison employed Portland attorney Francis Smith to purchase 100,000 shares of Pabagold in his own name on behalf of Asociacion Misionera Mundial. He, too, was given a \$50,000 cashier's check to make the purchase.

Allison and Austin flew to Klamath Falls, Oregon the same day. There they employed attorney Daved Vandenberg to purchase 100,000 shares of Pabagold in his own name on behalf of Petro Chem Trading Corp. Like the others, he was given a \$50,000 check to make the purchase.

The next day, April 8, Allison and Austin flew to Salt Lake City, Utah. There they employed attorney Dennis Astill and Glenn Hanni to purchase 100,000 shares each of the Pabagold in their own names on behalf of Contact Corp., one of the Panamanian corporate defendants, and International Diesel.

At about the same time, Allison contacted Reno, Nevada attorneys Richard Horton and Eric Richards and advised them to purchase 100,000 shares each of the Pabagold on behalf of Astor Trading and Films Unlimited.

Shortly before the April 9 scheduled sale date for the Pabagold issue, Allison prepared a list of the seven attorneys who would be buying the Pabagold stock. The list also contained a note at the bottom:

"Chet:

Buyers will call in Wednesday

Abe"

He gave the list to Austin, who, in turn, gave the list to Paulson Investment.

On April 9 Salt Lake City attorneys Astill and Hanni called Allison, refusing to purchase the Pabagold. Allison then arranged to have two other attorneys in that city Richard Campbell and Daniel Bowen, make the purchases. Allison then called Weiner and told him to call Paulson and have the names of Astill and Hanni stricken from the buyers list. Weiner called Paulson and had the names of Campbell and Bowen substituted for the names of the other two attorneys.

On that same day purchase orders for all 700,000 of the Pabagold shares were placed with Paulson Investment by the attorneys Allison and Austin hired. Paulson then prepared to market the Pabagold securities beginning April 20.

Shortly after Paulson recorded the Pabagold purchase orders, Allison discussed the offering with several friends and associates. On several occasions prior to April 20 he discussed Pabagold sales with friend Janice Jones. At first Allison would only tell her that he knew of an "exciting" new company, refusing to tell her its name. Later, after the market opened, he revealed the company's name and reiterated that the stock should do extremely well. In fact, he told her that the stock, opening at \$.50 per share, would probably split around the four dollar level.³

³In their response to the SEC's motion for summary judgment, defendants contest the accuracy of this statement, citing to a particular page of Allison's pre-trial deposition. But upon checking that reference it appears that Allison did indeed say this. When asked if he told Janice Jones that the stock would split, Allison responded, "No. I said in my opinion that's what they should do . . ." This is more like hair-splitting than presenting a genuine dispute of a material fact.

Allison also discussed the offering with friend Richard Horton (not the Reno attorney). He told Horton that he had acquired a majority of the stock and that it would be a good investment. He told Horton not to tell anyone about the stock because it might distort to three, four, or five dollars a share.

Allison also had similar discussions with friend and former business associate Richard Dugger.

On April 20 Paulson opened the market in Pabagold securities. Prior to that time, the underwriter had disseminated no press releases concerning the new issue.* Nevertheless, Paulson immediately received four unsolicited purchase orders from Allison's home town. Forty-five minutes later, Austin, at Allison's instruction, phoned attorney Higgins and instructed him to sell 5,000 shares of Pabagold. That same day, Allison and Austin instructed attorney Campbell to sell 5,000 shares.

On April 21 William Henderson, a friend of Allison's purchased 5,000 shares of Pabagold at $\frac{7}{8}$ per share.

The next day, Austin, again at Allison's direction, called attorney Vandenberg and instructed him to sell 25,000 shares of the Pabagold. Vandenberg sold the shares at \$1 per share. That same day, Richard Horton, Allison's friend, purchased 7,500 shares. Seven other orders soon followed from Denver, Colorado, where Horton resided. Richard Dugger purchased 10,000 shares. Janice Jones purchased 15,000 shares. Allison instructed Portland attorney Smith

*Defendants dispute this fact. Yet they refer to no pleading deposition, interrogatory, admission, or affidavit to support their position. This is not sufficient under Fed. R. Civ. P. 56(e) to present a genuine issue of material fact.

to sell 50,000 shares. Paulson did so over the next two days at \$1 per share.

April 23 Richard Horton purchased an additional 3,500 shares of Pabagold. Oren Spier, close friend of Austin's, purchased 2,000 shares. Delbert Biddle, another friend, bought 1,000 shares.

April 24 Allison instructed Reno attorney Richards to sell 34,000 shares and Salt Lake City attorney Campbell to sell 20,000. Janice Jones bought another 5,000. Russell Allison, the defendant's brother, purchased 4,000 shares.

Others, by this time, not acquainted with any of the defendants also purchased Pabagold. By April 27 a total of 156,000 shares had been sold. The price, by that date, had risen from \$.50 to 1 $\frac{1}{8}$ bid and \$2 asked. On April 27, the price of the stock having nearly quadrupled in the course of a week, Paulson Investment voluntarily ceased trading in the Pabagold securities.

OPINION

A. *The propriety of summary judgment*

As a general rule, summary judgment is not favored in complex litigation, particularly where, as in significant parts of this case, the issue of scienter or intent is important. *Poller v. Columbia Broadcasting Systems, Inc.*, 364 U.S. 464, 473 (1962). However, that is not to say that summary judgment is never allowed in complex cases. When the moving party has shown that there are no genuine issues of material fact or when all reasonable inferences that can be drawn from the evidence defeat the non-moving parties' claims, summary judgment is appropriate. *Pro-*

gram Engineering, Inc., v. Triangle Publications, Inc., 634 F.2d 1188, 1192 (9th Cir. 1980).

In opposing a motion for summary judgment the non-moving parties must do more than proclaim that there are factual disputes. The non-moving parties must support their claimed factual disputes with evidence sufficient at least to require a judge or jury to resolve the differing versions of the truth at trial. *Id.* at 1194. *See also Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1220 (9th Cir. 1980); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 950-51 (9th Cir. 1978).

In this case the SEC filed its motion for summary judgment accompanied by a list of what the agency thought were the undisputed facts. In response to this, defendants did not file a memorandum in opposition. They simply noted whether they contested any of the SEC's list of "undisputed" facts. Occasionally they referred to an affidavit or deposition. Often there were no references to supporting evidence at all. For example, in response to the SEC's assertion that defendants had intent to manipulate the market in Pabagold stocks defendants responded simply "dispute *in toto*."

In view of the fact that none of the disputed facts listed by defendants is material,⁵ and in view of the lack of any-

⁵The facts disputed by defendants are 1) whether Weiner promised to provide more than leads to Paulson, and instead had an agreement that Paulson would sell only to Weiner's buyers, who would be identified by their purchase orders in lots of 100,000; 2) whether Allison and Austin gave conflicting explanations to the attorneys they hired as to why they wanted attorneys to make the purchases; 3) whether Allison told William Henderson of the market in Pabagold; 4) whether offering circulars were provided to

thing other than conclusory allegations on the issue of scienter, this is one of those complex cases peculiarly amenable to summary disposition.

The case, then, turns on whether the SEC is entitled to judgment as a matter of law.

B. The SEC's claim of fraudulent manipulation

The SEC's first claim is based on § 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and § 17(a) of the Securities Act of 1933. Section 10(b) of the Exchange Act states that it is unlawful to use in connection with the purchase or sale of any security "any manipulative devise or contrivance." To implement this section, the SEC devised Rule 10b-5, which provides "it shall be unlawful for any person (1) to employ any device, scheme or artifice to defraud . . . (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." Section 17(a) of

each of the attorneys and purchasers Allison and Austin contacted; 5) whether Paulson was advised that attorneys Astill and Hanni would purchase the Pabagold before Allison and Austin even contacted the two lawyers; and 6) whether Paulson Investment would have underwritten the sale had it known that Allison controlled the entire offering.

Defendants were given an opportunity to supplement their response to the SEC's motion for summary judgment and to present evidence of additional factual disputes, but they declined to do so.

None of these factual disputes is material. That term has been interpreted by the courts to mean that the dispute is one that may effect the outcome of the litigation. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1958); *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). Regardless of how these factual disputes might have been resolved the outcome of this case would not have been changed. There is proof of securities law violations presented by the undisputed facts.

the Securities Act parrots the identical language. The only differences between the laws are that § 17(a) applies only to sellers and to interstate transactions.⁶ Section 10(b) and Rule 10b-5 apply to any sales by any persons.

To prevail on a claim of fraudulent manipulation under 10(b), Rule 10b-5, and § 17(a)(1) the SEC must prove two principal elements: manipulation and scienter. Under § 17(a)(2) no showing of scienter is required. *Aaron v. SEC*, 446 U.S. 680, 696-97 (1980).

"Manipulation" is defined in § 9(a)(2) of the Exchange Act as

Effecting alone or with one or more persons a series of transactions in any security . . . creating actual or apparent active trading in such security or raising or

⁶Defendants vigorously oppose the application of § 17(a) since none of them were sellers in the ordinary meaning of the word. Paulson Investment, they argue, was the only seller. Such an interpretation would emasculate federal securities laws. It would mean that as long as one has a third party do the actual selling, liability can be removed from the one actually in control. Fortunately, this is not the intent of the Securities Act. Section 2(3) of the Act gives a very broad definition to the concept of the seller. Under this definition and its judicial interpretation a seller is one whose actions are a substantial factor in causing a purchaser to buy a security. *Lawler v. Gilliam*, 569 F.2d 1283, 1287 (4th Cir. 1978); *Lewis v. Walston & Co.* 487 F.2d 617, 621-22 (5th Cir. 1973). It is not necessary that a seller own the stock, only that he participate in a significant way in the sale on behalf of the actual owner. *Lawler*, 569 F.2d at 1288. All of the defendants' actions were substantial factors in causing Pabagold stocks to be sold. Therefore, they are sellers within the meaning of the Securities Act and § 17(a) in particular.

depressing the price of such security for the purpose of inducing the purchase or sale of such security.'

What the statute means by "effecting" the manipulation has been defined by the courts. When a person has a "substantial, direct pecuniary interest in the success of a proposed offering" and he "takes steps to effect a rise in the market" that person comes within the purview of this law. *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 795 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970).

"*Sciencer*" as recently defined by the Supreme Court, is a "mental state embracing intent to deceive, manipulate, or defraud." *Aaron*, 446 U.S. at 686 n. 5.

The SEC has clearly proven violations of the cited laws by Allison, Austin International Sales, Ltd., the Panamanian and Cayman Island corporations, and the religious society. Each of those defendants has a direct pecuniary interest in the sale of the Pabagold. The foreign corporations and the missionary society owned the stock. International Sales was to receive the proceeds of the Pabagold sales. And both Allison and Austin represented themselves as officers of International Sales. Indeed, International Sales was admittedly a mere dba for Austin.

Allison, representing the foreign corporations and the missionary society,* and Austin twice attempted to pur-

*It is well settled that manipulative activities expressly prohibited by § 9(a)(2) of the Exchange Act are also violations of § 10(b) of the Exchange Act and § 17(a) of the Securities Act. See *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 476 (1976); *SEC v. Resch-Cassin & Co.*, 362 F. Supp. 984, 975 (S.D.N.Y. 1973).

*By virtue of Allison's powers of attorney and the officer positions of Allison and Austin in the defendant corporations, the foreign corporations and the religious society are liable for the actions of Allison and Austin. But even if this were not the case, the fact

chase the entire offering of Pabagold securities. After successfully doing so on the second attempt they then arranged to have limited amounts of the stock sold as Allison simultaneously encouraged friends and associates to buy. This created the appearance of an active market.* The

that these corporations are, for the purposes of these proceedings, the individual defendants' nominees or alter egos disposes of the question of their liability. Defendants, of course, do not concede this point. It is a finding made by this court pursuant to Fed. R. Civ. P. 37(b)(2)(A) and 37(d) as a sanction for defendants' willful failure to cooperate with the SEC's discovery efforts to determine the truth of this very fact.

Five months ago the SEC served a request for the production of documents. Despite the express requirement of Fed. R. Civ. P. 34(b) that defendants must respond within 45 days, and despite repeated requests by the SEC, defendants made no response whatsoever. When a party makes no response at all, sanctions are in order, even without a court order compelling discovery. *4A Moore's Federal Practice* ¶ 37.02[4] (2d ed. 1981).

At the same time the request for documents was filed, the SEC noticed the depositions of the officers, directors, and managing agents of the foreign corporate defendants. Defendants did not move for a protective order, as is the recommended practice. They moved to quash. The motion to quash was denied and the defendants were ordered to show up for depositions. Defendants flatly said they would not comply without further orders from the court. At the preliminary injunction hearing, the defendants were told to obey the court's order, but they have not done so to date.

The repeated refusals to obey discovery requests and orders of this court leave little choice but to impose the sanction as provided above. This sanction is appropriate particularly, where, as here, a party's actions are willful or in bad faith, and it may be imposed even though it leads to summary judgment against the offending party. See *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979).

proof is in the rising price. In seven days the price of Pabagold stock nearly quadrupled. A better case of manipulation is hard to imagine.

As for the intent of the parties, the facts here, too, support the SEC's claims. The stock was extremely risky. The Pabagold offering circular said so in detail. Yet Allison, Austin, and others invested in it, indeed purchased the entire lot. Moreover, when Allison orchestrated the purchases, he did so on both occasions through go-betweens. In fact, he used not one but seven different go-betweens from three different states to purchase the stock. Allison's name never appeared on a document involved in the Pabagold transactions. He did not even sign his own name to the cashier's checks given to the seven attorneys. When he did need to contact the underwriter he did so through intermediaries. Allison had Austin deliver the list of attorneys who would purchase the stock. Allison did not do it himself. It is worth noting that at the bottom of this list is a note:

"Chet:

Buyers will call in Wednesday

Abe"

It is as if Allison wanted the underwriter to think that the listed attorneys were more of Weiner's leads and not buyers arranged by Allison. This inference is borne out by the fact that when Allison received word that two of the attorneys, Astill and Hanni, refused to cooperate, Allison had Weiner call Paulson Investment to change the names on the list. Allison did not make the call himself. Also probative of the parties' intent is the fact that they in-

sisted that the attorneys not reveal the names of their clients even when they were told that the attorney-client privilege did not apply.¹⁰

There seems to be no rational reason for going to all of this trouble if not to create the impression of an active market without letting on who was really in control. Defendants themselves offer no alternative explanation for their action in creating this illusion. Their brief simply begins with the words, "so what"? In view of the facts and defendants response, the only reasonable inference to be drawn is that defendants intended to manipulate the market in Pabagold stock and did so in violation of § 10(b), Rule 10b-5, and § 17(a)(1) & (3).

Abe Weiner is not mentioned in this context for good reason. Under the facts that may be considered here there is no evidence of a "substantial, direct pecuniary interest" in the Pabagold offering on Weiner's part. Weiner did participate in several important misrepresentations, for which he is liable on separate grounds. But he does not fit as a § 9(a)(2) manipulator under the test devised in *Crane*.

C. SEC's claim of misrepresentation

The SEC's second claim is based on § 10(b) or the Exchange Act, Rule 10b-5, and § 17(a)(2) of the Securities Act. As mentioned above, § 10(b) contains a broad proscription against "any manipulative device or contrivance."

Rule 10b-5 specifies one of the prohibited devices or contrivances as "(2) to make any untrue statement of a material fact or omit to state a material fact . . ." Similarly, § 17(a)(2) makes it illegal "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact . . ." To prevail on this claim the SEC must prove misrepresentation or omission of a material fact and, in the case of Rule 10b-5, scienter.¹¹

The misrepresentation alleged here is primarily in the nature of a series of omissions. An omission is silence in the face of a duty to speak "arising from a relationship of trust and confidence between parties to a transaction." *Chiarella v. United States*, 445 U.S. 222, 230 (1980).

Whether an omission is material is determined by applying an objective standard. The test is whether the omitted information would have been important to a reasonable investor. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448, 449 (1976); *United States v. Margala*, No. 80-1653, slip op. at 5 (9th Cir. Nov. 30, 1981).

The SEC has carried its burden in proving its case as a matter of law against each of the named defendants here. Each of them participated in a scheme to purchase the entire lot of the Pabagold and manipulate the market to secure an increase in the price of the stock, all the while concealing the fact that the entire offering was controlled

by one person. Weiner acted as a buffer between Allison and Austin and Paulson Investment, omitting the fact that he was doing so. Allison and Austin, acting on behalf of the foreign corporate defendants and the religious society did not disclose to any of the attorney-purchasers that others were being hired to buy up the entire offering of Pabagold. Several testified that had they known this they would not have participated.

As to the duty of each of these defendants the facts reveal that all were in a "relationship of trust and confidence" with persons to whom they should have disclosed important information. Weiner was to supply leads to the underwriter. He was the apparent main contact between the purchasers and the underwriter. He had a duty to disclose the fact that the leads he provided were actually acting on behalf of one person. So too, Allison and Austin, in hiring the seven attorney-purchasers were clearly in a fiduciary relationship and were under a duty to disclose.

The omissions were undoubtedly material. Any reasonable investor would consider it important to know that an offering was controlled substantially or entirely by a single individual. The underwriter would certainly want to know this information, since any time a single individual owns an entire offering the appearance of impropriety and the likelihood of SEC intervention is more than a remote possibility. For the same reasons any reasonable attorney would want to know the omitted information in this case.

Finally, as explained above, there was scienter on the part of each of the defendants to conceal Allison's control of stock and thereby allow him to manipulate the market in Pabagold securities.

D. The SEC's claim of registration violations

In addition to the fraud claims the SEC brings this suit against defendants on the grounds that they bought and sold securities without filing proper registration forms with the agency. Section 5 of the Securities Act provides that it is unlawful for any person to buy or sell any security that has not been registered with the SEC. There are, however, two major exceptions to this requirement. First, § 4 of the Securities Act provides that only "underwriters" are subject to the registration requirement. Second, § 3 of the Act exempts certain categories of securities from registration. Pursuant to this section, the SEC devised Regulation A, which provides a registration exemption for certain small issues provided an offering circular accompanies each sale of the securities.

The SEC has the burden of proving a *prima facie* violation of § 5. The burden then shifts to the defendants to prove the applicability of an exemption. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126-27 (1953). There is no debate over whether the SEC has met its burden here. The issue is whether the facts indicate that defendants either are not underwriters or have a Regulation A exemption.

1. Non-underwriters exemption

The Court of Appeals for the Ninth Circuit, in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980), recently reviewed the issue of when a person is an underwriter within the meaning of § 4. And that case provides the applicable rule and result here.

Murphy involved a corporation that promoted limited partnerships to which it sold cable television equipment. The chairman of the board of the corporation, Murphy,

hired a securities broker to handle the partnership promotions. Despite the fact that Murphy hired a broker to handle the actual sales he was active in meeting with potential investors and in preparing advertising. When Murphy began misrepresenting the financial status of his business the SEC sued for securities fraud and for selling unregistered securities. Murphy pointed to the broker as the underwriter so that he could avail himself of the § 4 exemption. The court was unconvinced and found Murphy liable.

The court said that even though a person does not carry the title of underwriter or issuer he may still be considered an underwriter or issuer if he participates in the sale of unregistered securities. By "participates" the court meant directly or indirectly controlling the underwriter. This, in turn, the court said, could be defined in terms of a "but for" or a "substantial factor" test. The court expressed no preference in the *Murphy* case because it found the defendant to be a participant under either test.

In view of *Murphy* it is hard to understand how defendants can argue that they were not underwriters. Weiner, Allison, Austin, and the companies on whose behalf they acted, all participated in the Pabagold sale. Allison and Austin, much like the defendant in *Murphy*, arranged the sales, lined up customers and advertised the stock. Weiner acted as the buffer between those two and the underwriter. None of these transactions would have taken place without the actions and representations of the defendants.

Defendants, then, would be participant underwriters under either the but for or the substantial factor test. They

cannot, therefore, look to § 4 for an exemption from the securities registration requirements.

2. *Regulation A exemption*

Paulson did apply for and was granted Regulation A status for the Pabagold issue. And the SEC has never terminated that status. The issue here is whether the conduct of the defendants, by itself, voids the Regulation A exemption.

Once again, a recent ninth circuit opinion resolves the controversy. In *SEC v. Blazon, Corp.* 609 F.2d 960 (9th Cir. 1979), the defendant filed appropriate papers and obtained a Regulation A status for his securities offering. But then he sold the securities using misleading offering circulars. The SEC sued, arguing as it does here that the misleading circulars voided the Regulation A exemption *ab initio*. The court of appeals disagreed. It said that

incomplete or inadequate filing or filing which becomes incomplete or inadequate will not result in an automatic loss of the Regulation A exemption. Regulation A provides the Commission with a less severe mechanism to deal with such problems. The Commission may suspend the exemption.

Id. at 968-69. The SEC has no basis to challenge the defendants' Regulation A exemption in this case. *Blazon* makes it clear that, at least in this circuit, defendants' actions do not automatically terminate the Regulation A status.

E. *The remedies sought*

The SEC seeks a permanent injunction to prevent defendants from further trading in Pabagold securities. The

agency also seeks as ancillary relief disgorgement of all monies obtained in the course of the Pabagold trading.

Special rules apply when considering injunctions in an SEC enforcement action. Section 20(b) of the Securities Act and § 21(e) of the Exchange Act provide that the SEC is entitled to injunctive relief when a person is "engaged or is about to engage in" illegal activity. The courts have uniformly interpreted this to mean that the SEC must prove "that there is a reasonable likelihood of further violation." *SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 77 (D.C. 1980); *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 99 (2d Cir. 1978). In determining the likelihood of future violations the court is commonly guided by the past conduct of defendants.¹² *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975).

As for the disgorgement of proceeds, that remedy is left to the discretion of the trial court. It is a matter of the court's equity powers. The practice of disgorgement, however, is encouraged as a means of preventing unjust enrichment and as a means of preserving the integrity of the securities laws. See *SEC v. Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974); *SEC v. Manor Nursing Centers, Inc.* 458 F.2d 1082, 1104 (2d Cir. 1972).

Both of the remedies requested are appropriate here. The SEC has proven that, on the basis of the past conduct of the defendants and the degree of scienter shown by the

facts, not only have defendants violated the law but would continue to do so if not enjoined. Moreover, it would be anomalous to decide that there has been a violation of the securities laws and yet allow defendants to keep any proceeds from the sale of Pabagold stocks.

CONCLUSION

The SEC has shown as a matter of law that all but one of the defendants violated the federal securities laws regarding fraudulent manipulation of stocks. Moreover, the agency has proven that all of the defendants violated the federal laws prohibiting misrepresentations in securities transactions. Defendants, on the other hand, have presented a successful defense against the claim that they sold unregistered securities in violation of § 5 of the Securities Act. Summary judgment is therefore granted in favor of the plaintiff on the first claim, for manipulation of securities, except with respect to defendant Weiner. Summary judgment is granted in favor of the plaintiff on the second claim, for manipulation. Summary judgment is granted in favor of defendants on the third claim.

The SEC having proven the likelihood of future violations, the defendants are permanently enjoined from participating in the purchase or sale of Pabagold securities. Furthermore, they are ordered to disgorge any proceeds acquired from the sale of Pabagold securities not already disgorged.

SO ORDERED.

Dated this 18th day of January, 1982.

Robert C. Belloni
United States District Judge

Appendix B

**United States Court of Appeals
for the Ninth Circuit**

No. 82-3305

D.C. No.

81-435-BE

**Securities and Exchange Commission,
Plaintiff-Appellee**

vs.

**Ian T. Allison, et al.,
Defendants-Appellants.**

MEMORANDUM

[Filed Oct. 24, 1983]

**Appeal from the United States District Court
for the District of Oregon**

**Honorable Robert C. Belloni
United States District Judge, Presiding**

Argued and Submitted: June 14, 1983

**Before: KENNEDY AND BOOCHEVER, Circuit Judges,
and GILLIAM,* District Judge.****

*Honorable Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

**The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is

Appellants¹ seek reversal of a trial court order of summary judgment and injunctive relief, granted on motion of the Securities and Exchange Commission (SEC). The district court found all appellants other than appellant Weiner liable for manipulating the market in Pabagold stock in violation of §§ 17(a)(1) and (3) of the Securities Act of 1933, 15 U.S.C. §§ 77q(a)(1) and (3) and § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5. It found all appellants, including Weiner, liable for the misrepresentation and omission of material facts in violation of §§ 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a)(2), and § 10(b) of the Exchange Act and Rule 10b-5. The district court ordered disgorgement of the proceeds from appellants' sales of Pabagold stock. It also permanently enjoined appellants from trading in Pabagold securities. We affirm, but order a minor change in the trading injunction.

Appellants contend that with respect to the scienter element in the SEC's manipulation charge, a genuine issue for trial exists. The SEC produced abundant evidence on the issue. First, the purchasing plan Allison and Austin employed was extraordinarily secretive—they went to great efforts to conceal from Paulson, the underwriter of

ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

¹Defendants-appellants consist of the following: Ian T. Allison; Fred K. Austin; International Sales, Ltd. (a d/b/a for Austin); International Minerals, S.A., Films Unlimited Corporation, Astor Trading Corporation, Contact Corporation, International Diesel Corporation, Asociacion Misionera Mundial, and Petro Chem Trading Corporation (the "foreign entities"); and Abe M. Weiner.

the issue, both that they were the moving force behind each buyer in the offering and that Allison was involved at all. Second, the note signed by Allison for Weiner indicates an expectation that Paulson would look to Weiner's leads as buyers. Third, appellants arranged buy orders covering the entire issue on two separate occasions, the first of which was before the offering circulars had even been circulated. Finally, appellants' conduct subsequent to their actual purchase of the entire offering, consisting of profiting through the sale of Pabagold stock while concealing the fact that they controlled the entire offering, discloses the intent to obtain that position.

Appellants' response consisted of an assertion by Allison that he did not intend or expect to acquire the entire offering. This bare denial, without evidentiary support, is insufficient as a matter of law to defeat the summary judgment motion. Where the moving party has met its burden, the opposing party must present specific facts showing that there are genuine issues for trial. Fed. R. Civ. P. 56(e); *see also Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1192-93 (9th Cir. 1980); *Neely v. St. Paul Fire and Marine Insurance Co.*, 584 F.2d 341, 343-44 (9th Cir. 1978). The only reasonable inference here, even viewing the evidence in the light most favorable to appellants, is that they knew there was a high likelihood that their buying plan would acquire enough Pabagold stock to manipulate the market. This, coupled with their later know-

ing manipulation of that market, is sufficient to establish scienter.²

Appellants' challenge to the district court's material misrepresentations and omissions finding is also without merit. It is undisputed that appellants concealed from Paulson the fact that the entire offering was controlled by Allison. Such a fact would certainly be something Paulson would want to know, as Paulson was not only the maker of the presumably active market but also faced personal liability. The evidence supporting the summary judgment motion also shows that Weiner's active participation in this misrepresentation is beyond dispute. He not only concealed the fact that Allison and Austin were behind each of the so-called buyers whose names he supplied, but he gave affirmatively the misimpression that he obtained interested investors during the course of foreign travels, when in fact he discussed the Pabagold offering only with Allison. Finally, Allison and Austin concealed the material fact of their control of the Pabagold offering from the people they told about Pabagold stock who subsequently purchased it. There was no evidentiary submission by appellants to contest this matter.

Appellants next contend that the district court erred in holding the foreign entities liable with Allison and Austin. The district court found the foreign entities to be the alter egos of Allison and Austin as a sanction for willful

²Given Allison's and Austin's relationship to the foreign entities and the district court's alter ego finding, *see infra*, appellants had a sufficient interest in the offering for purposes of § 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i(a)(2), and *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).

failure to cooperate with the SEC's discovery efforts. The imposition of sanctions under Rule 37 of the Federal Rules of Civil Procedure will not be overturned unless the district court has abused its discretion. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam). Although it is not the usual case, a corporation may be liable as the alter ego of a natural person. *See, e.g., Hudson v. Wylie*, 242 F.2d 435 (9th Cir.), cert. denied, 355 U.S. 828 (1957). Here the foreign entities willfully obstructed discovery on the precise issue of their relationship to Allison and Austin. The district court's sanction was not an abuse of discretion.

Appellants finally contend that the injunctive relief ordered by the district court was beyond its equitable powers. In actions by the SEC for injunctive relief under the Securities Act and the Securities Exchange Act, the district court has wide discretion. *See SEC v. Blason Corp.*, 609 F.2d 960, 967 (9th Cir. 1979). The grant or denial of injunctive relief will not be disturbed on appeal unless there has been a clear abuse of that discretion. *See SEC v. Arthur Young & Co.*, 590 F.2d 785, 787 (9th Cir. 1979).

The district court's order directing disgorgement of the proceeds from appellants' sale of Pabagold stock was well within the court's discretion. The order amounted essentially to a grant of rescission, a reversal of the transactions found to be illegal, with restoration of the injured parties to their status quo ante. Such an order was within the district court's traditional equity powers, *see SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 96 (2d Cir. 1978), and is well-founded in securities law prece-

dent. See, e.g., *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972).

The district court's order enjoining appellants from any trading in Pabagold stock was also within the court's discretion. Given the content of appellants' scheme and the fact that they would remain in control of the entire block of Pabagold securities, the district court could well have concluded that the injunction of only illegal sales may not have been effective. Appellants, upon presentation to the district court of a reasonable plan guaranteeing no further manipulation of Pabagold securities, will be entitled to dispose of them, and we remand so that this condition may be included as an explicit provision in the injunction.

The grant of summary judgment of the district court is affirmed. The case is remanded so the order may be amended in the minor respect noted.

AFFIRMED IN PART, and REMANDED.

Appendix C

In the United States District Court
For the District of Oregon

Civil No. 81-435-BE

Final Judgment of Permanent Injunction
and Other Equitable Relief

Securities and Exchange Commission,
Plaintiff,

vs.

Ian T. Allison, Fred K. Austin, Abe Weiner,
International Minerals, S.A., Films Unlimited Corporation,
Astor Trading Corp., Contact Corp.,
International Diesel Corp.,
Asociacion Misionera Mundial and
Petro Chem Trading Corp.,
Defendants.

[Filed May 24, 1982]

Plaintiff Securities and Exchange Commission ("Commission") having filed a complaint for injunctive and other equitable relief ("Complaint"), and the court having considered the pleadings and papers filed herein and having considered the evidence introduced during the hearing on the motion for a preliminary injunction and having considered plaintiff Commission's motion for summary judgment on the ground that there are no material issues of disputed fact and having also considered defendants' motion to dismiss, and upon the Findings of Fact and Conclusions of Law reached by this court and issued in its

opinion dated January 18, 1982, and the court being fully advised in the premises:

I

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Ian T. Allison, Fred K. Austin, International Sales, Ltd., International Minerals, S.A., Films Unlimited Corporation, Astor Trading Corporation, Contact Corporation, International Diesel Corporation, Asociacion Misionera Mundial and Petro Chem Trading Corporation, their officers, agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them, and each of them who receive actual notice of this judgment by personal service or otherwise, be and they are hereby permanently restrained and enjoined from, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security of Pabagold, Inc. or any other issuer,

- (a) employing any device, scheme or artifice to defraud;
- (b) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or
- (c) making any untrue statement of a material fact or omitting to state a material fact necessary, in order to make the statements made, in the light of the circumstances under which they were made, not misleading;

concerning among other things,

- (1) Their interest in the securities of any issuer;
- (2) Any pecuniary interests they have in connection with the purchase or sale of the securities of any issuer;
- (3) Their manipulation of the market in the securities of any issuer;
- (4) Their use of intermediaries or go-betweens in connection with the purchase or sale of the securities of any issuer;
- (5) Their ownership or control of the securities of any issuer;
- (6) Their trading in the securities of any issuer;
- (7) Their role in connection with the purchase or sale of the securities of any issuer by others;
- (8) The true identity of the persons, individuals and entities purchasing or selling the securities of any issuer; or
- (9) The identity of the actual persons, individuals or entities controlling the securities of any issuer.

II

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Abe M. Weiner, his agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with him and each of them who receive actual notice of this judgment by personal service or otherwise be and they are permanently restrained and enjoined from, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale

of any security of Pabagold, Inc. or any other issuer,

- (a) employing any device, scheme or artifice to defraud;
- (b) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or
- (c) making any untrue statement of a material fact or omitting to state a material fact necessary, in order to make the statements made, in the light of the circumstances under which they were made, not misleading

concerning among other things,

- (1) His role in connection with the purchase or sale of securities of any issuer by others;
- (2) The true identity of the persons, individuals and entities for whom he is acting in connection with the purchase or sale of the securities of any issuer;
- (3) The identity of the actual persons, individuals or entities who control the securities of any issuer.

III

IT IS FURTHER ORDERED, ADJUDGED AND DECreed that Ian T. Allison, Fred K. Austin, International Sales, Ltd., International Minerals, S.A., Films Unlimited Corporation, Astor Trading Corporation, Contact Corporation, International Diesel Corporation, Asociacion Misionera Mundial and Petro Chem Trading Corporation, their officers, agents, servants, employees, attorneys, successors and assigns and those persons in active concert or participation with them, and each of them who receive

actual notice of this judgment by personal service or otherwise, be and they are hereby permanently restrained and enjoined from, directly or indirectly, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, in the offer or sale of any security of Pabagold, Inc. or any other issuer.

(a) employing any device, scheme or artifice to defraud,

(b) obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser

concerning among other things,

(1) Their interest in the securities of any issuer;

(2) Any pecuniary interests they have in the purchase or sale of the securities of any issuer;

(3) Their manipulation of the market in the securities of any issuer;

(4) Their use of intermediaries or go-betweens in the offer or sale of the securities of any issuer;

(5) Their ownership or control of the securities of any issuer;

(6) Their trading in the securities of any issuer;

(7) Their role in the offer or sale of the securities or any issuer by others;

- (8) The true identity of the persons, individuals and entities purchasing or selling the securities of any issuer; or
- (9) The identity of the actual persons, individuals or entities controlling the securities of any issuer.

IV

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT Abe M. Weiner, his agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with him, and each of them who receive actual notice of this judgment by personal service or otherwise, be and they are hereby permanently restrained and enjoined from, directly or indirectly, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, in the offer or sale of any security of Pagabold, Inc. or any other issuer, obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, concerning among other things

- (1) His role in the offer or sale of the securities of any issuer by others;
- (2) The true identity of the persons, individuals and entities for whom he is acting in the offer or sale of the securities of any issuer; or
- (3) The identity of the actual persons, individuals or entities who control the securities of any issuer.

V

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, once defendants have complied with paragraphs six and seven hereof, the stock certificates of Pabagold be registered in the names of the corporate and church defendants but defendants Ian T. Allison, Fred K. Austin, Abe M. Weiner, International Sales, Ltd., International Minerals, S.A., Films Unlimited Corporation, Astor Trading Corporation, Contact Corporation, International Diesel Corporation, Asociacion Misionera Mundial and Petro Chem Trading Corporation, their officers, agents, servants, employees and attorneys in fact and those persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise and each of them, be and they are hereby permanently restrained and enjoined from purchasing, acquiring, selling, disposing of, transferring or alienating any securities of Pabagold, Inc. or any interest therein or causing or participating, directly or indirectly, in any such purchase, acquisition, sale, disposition, transfer or alienation.

VI

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ian T. Allison, Fred K. Austin, Abe M. Weiner, International Sales, Ltd., International Minerals, S.A., Films Unlimited Corporation, Astor Trading Corporation, Contact Corporation, International Diesel Corporation, Asociacion Misionera Mundial and Petro Chem Trading Corporation and each of them shall within ten days following the entry of this order, disgorge and pay over to Paulson Investment Company, at its offices in Portland,

Oregon, all of the proceeds acquired or accrued to their benefit as a result of sales of any securities of Pabagold, Inc.

VII

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that such part of the temporary Restraining Order issued by this Court on May 18, 1981, freezing proceeds of the sale by the defendants of Pabagold, Inc. stock and providing for the deposit of such proceeds in a local bank in Portland, Oregon is hereby vacated and **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that such proceeds are awarded to Paulson Investment Company and First Interstate Bank of Oregon, N.A., the depository of such proceeds, is hereby directed to pay over such proceeds together with accumulated interest to Paulson Investment Company forthwith.

VIII

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' cause of action for violation of Section 5 of the Securities Act of 1933 be and the same hereby is dismissed and summary judgment is hereby entered on said cause of action.

And there being no just reason for delay, the clerk of this Court is hereby directed to enter this Order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: May 24, 1982.

Robert C. Belloni
United States District Judge

Office - Supreme Court, U.S.
FILED
MAR 27 1984

No. 83-1203

In the Supreme Court of the United

ALEXANDER L. STEVENS
CLERK

OCTOBER TERM, 1983

IAN T. ALLISON AND FRED K. AUSTIN, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION**

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QUESTION PRESENTED

Whether the courts below properly held that petitioners had failed to raise an issue of material fact sufficient to defeat a motion for summary judgment regarding the SEC's claims that petitioners fraudulently manipulated the market for certain securities and that petitioners made material misrepresentations by failing to disclose various facts about their dealings in those same securities.

(I)

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In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO
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OPINIONS BELOW

The unpublished opinion of the court of appeals (Pet. App. A25-A30) is reported at 722 F.2d 747 (table). The opinion of the district court (Pet. App. A1-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1983. The petition for a writ of certiorari was filed on January 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1980, Pabagold, Inc., a Delaware corporation, was seeking capital to finance its plans to market a new suntan lotion (Pet. App. A3). With the assistance of Abe Weiner, a friend of petitioners, Pabagold's officers met

with Paulson Investment Company (Paulson), a broker-dealer (*ibid.*). Paulson agreed to underwrite a public offering of 700,000 shares and to act as market-maker after the initial distribution (*ibid.*; Sept. 15-16, 1981 Tr. 94-95). The offering was originally scheduled for March 1981 (Pet. App. A4).

Between January and March 1981, unknown to Paulson, petitioners, two businessmen with substantial foreign business connections, made arrangements to have various nominees place buy orders with Paulson for the entire distribution (Pet. App. A4-A6). Petitioners' initial attempt to purchase the entire offering was aborted, however, when Paulson, upon receiving the purchase orders before any circulars were distributed, suspended the offering pending an inquiry regarding the origins of the orders (*id.* at A6, A28).¹ Weiner represented to Paulson that the offers came from his foreign contacts; he concealed that petitioners had arranged all of the offers (*id.* at A28). Paulson accepted Weiner's representations and rescheduled the offering (*id.* at A6).

Paulson renewed the Pabagold offering in April 1981, but offered the stock in only three states in which the offering had been approved for sale by state securities commissions. Once again, unknown to Paulson, petitioners used a network of nominees to place purchase orders for the

¹The offering was made under Regulation A, a limited exemption from the registration otherwise required under the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.* 17 C.F.R. 230.251 *et seq.* Regulation A requires that an offeree receive an offering circular at or prior to the time an offer to sell is made. 17 C.F.R. 230.256(a)(1). Because Paulson received funds prior to distributing the offering circulars, it apparently concluded that someone must have made offers prior to dissemination of the circulars, and that the exemption from registration was therefore threatened (Pet. App. A6). See 17 C.F.R. 230.256(a)(2).

entire offering. Petitioners hired seven agents in the three states, each of whom was to purchase 100,000 shares in his own name, on behalf of one of seven foreign corporations controlled by petitioners (Pet. App. A6-A8). Petitioners failed to disclose to these individuals that they were hiring others to place similar orders to control the entire offering (*id.* at A19). Paulson executed the purchase orders in the names of the seven agents, thus placing the entire distribution under petitioners' control (*id.* at A8).

Prior to commencement of trading in the secondary market, petitioners touted the stock to other people without disclosing that they controlled all the shares to be sold in the market (Pet. App. A8-A9). Thus, when the market opened, Paulson received unsolicited offers to buy the stock from persons petitioners had contacted (*id.* at A9).² In response to the demand created for Pabagold securities, petitioners sold their shares into the market at steadily increasing prices. By the sixth day of trading, the price reached a high of \$1-5/8 bid and \$2 asked before Paulson voluntarily suspended trading (*id.* at A9-A10). In sum, during the six days of trading, petitioners sold 134,000 shares at an average of \$1 per share that they had purchased at 50 cents per share (Exh. 32).

2. Shortly after Paulson suspended trading, the Commission filed the instant suit against petitioners and others in the United States District Court for the District of Oregon seeking injunctive and other equitable relief (Pet. App. A2). The Commission alleged that petitioners' conduct violated, among other things, antifraud provisions of the Securities Act § 17(a), 15 U.S.C. 77q(a), and the

²For example, the day the market opened, four of petitioner Austin's friends immediately placed unsolicited orders for 10,000 shares with Paulson (Pet. App. A9; Exh. 32). During the first two days of trading, four individuals to whom petitioners touted Pabagold stock purchased over 70% of the stock traded (Pet. App. A9-A10; Exhs. 31,32).

Securities Exchange Act of 1934 (Securities Exchange Act) § 10(b), 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5.³

The Commission moved for summary judgment against all defendants (Pet. App. A2). In response, defendants filed an affidavit by their counsel in which they conceded many of the material facts listed in the Commission's statement of undisputed facts, but disputed certain items (Pet. App. A11). The court did not act on the Commission's motion for summary judgment at that time. The Commission renewed its motion after the evidentiary hearing on a preliminary injunction motion was completed. The court then held oral argument on the motions for a preliminary injunction and for summary judgment (Dec. 17, 1981 Tr. 16, 64). Petitioners never filed an opposing memorandum, affidavits or any other evidence in response to the renewed motion for summary judgment (Pet. App. A11-A12).

The district court granted the Commission's motion for summary judgment (Pet. App. A1-A24). The court concluded that petitioners secretly obtained control of the entire Pabagold offering and then manipulated the market by directing the sale of limited amounts of the stock while encouraging others to buy Pabagold stock, in violation of Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5 (Pet. App. A16-A17).⁴ The court concluded: "A better case of

³The district court entered an order temporarily restraining all of the defendants from violating antifraud provisions of the federal securities laws and freezing the proceeds from petitioners' sales of Pabagold stock (Pet. App. A2). The order was extended by consent to permit the parties to take discovery and otherwise prepare for an evidentiary hearing or the Commission's application for a preliminary injunction.

⁴The district court held that no genuine issues of material fact existed (Pet. App. A2). The court noted that, despite the explicit requirements of Fed. R. Civ. P. 56, petitioners had failed to support their claims of material factual disputes with supporting evidence (Pet. App. A11-A12).

manipulation is hard to imagine" (Pet. App. A16). The district court also found that petitioners knowingly misrepresented material facts, and omitted to state others, regarding the scheme, also in violation of antifraud provisions (Pet. App. A17-A19).⁵ Finally, the court rescinded the stock sales by ordering the stock petitioners had sold returned to them; enjoined the defendants from any further trading in Pabagold stock; and ordered them to disgorge the proceeds of their illegal sales (Pet. App. A37-A38).⁶

The court of appeals affirmed in all material respects (Pet. App. A25-A30). On the issue of petitioners' scienter in the manipulation scheme, the court found that the Commission "produced abundant evidence" that petitioners "went to great efforts" to conceal their control of the entire offering and to manipulate the market (Pet. App. A26-A27). The court found that petitioners' "bare denial, without evidentiary support" was insufficient to defeat a motion

⁵With respect to the Commission's charge that petitioners violated the registration provisions of the Securities Act, Section 5(a) and (c), 15 U.S.C. 77e(a) and (c), the district court denied the Commission's motion for summary judgment and granted defendants' motion to dismiss that part of the Commission's complaint (Pet. App. A20-A22). The Commission did not appeal that ruling.

⁶In addition to petitioners, Abe Weiner and seven foreign corporations controlled by petitioners (Pet. App. A14-A15 n.8) were enjoined from violating various antifraud provisions in connection with the manipulation of Pabagold stock (Pet. App. A32-A38). They have not sought review of the decision below by this Court.

The district court held that the seven foreign corporations were liable for petitioners' actions on alternative grounds. First, the court rested liability on the corporate powers granted petitioners to conduct the manipulative scheme in the names of these corporations (Pet. App. A14-A15 n.8). Second, the court rested liability on its finding, as a sanction under Fed. R. Civ. P. 37(b)(2)(A) and (d), that these corporations were petitioners' nominees or alter egos (Pet. App. A14-A15 n.8). The sanction was imposed for "defendants' willful failure to cooperate with the SEC's discovery efforts to determine the truth of this very fact" (*ibid.*).

for summary judgment under Rule 56(e) (Pet. App. A27-A28). Similarly, the court found petitioners' challenge to the findings of material misrepresentations and omissions to be without merit, as "[t]here was no evidentiary submission by [petitioners] to contest this matter" (Pet. App. A28).

ARGUMENT

1. Petitioners argue (Pet. 8-15) that summary judgment on the manipulation count was inappropriate because there was a genuine issue of material fact regarding scienter.⁷ This factbound issue, which was correctly decided below, does not warrant review by this Court. Despite the uncontested evidence introduced by the Commission, which the district court found to be "abundant," petitioners chose to rest on their "conclusory allegations" and "bare denials" on the issue of scienter (Pet. App. A11-A12, A27). Where scienter is an issue, summary judgment may properly be granted "[i]n the absence of 'any significant probative evidence tending to support' " the opposing party's contention. *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1207 (9th Cir. 1982)) quoting *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). The courts below were clearly correct in holding that petitioners had failed to satisfy their burden under Rule 56, to demonstrate the existence of a triable factual issue.⁸

⁷Scienter is an element of a violation of Section 17(a)(1) of the Securities Act, 15 U.S.C. 77q(a)(1) and Section 10(b) of the Securities Exchange Act; it is not an element of a violation of Section 17(a)(2) and (3) of the Securities Act, 15 U.S.C. 77q(a)(2) and (3). *Aaron v. SEC*, 446 U.S. 680, 697 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). Thus, the findings of petitioners' violations of Section 17(a)(2) and (3) would stand even if the Commission had not established scienter as to their other antifraud violations.

⁸Petitioners also claim (Pet. 7, 16) that the Commission did not prove they had a financial interest in the sales of Pabaygold stock. On the contrary, the district court found the foreign corporations in whose names the shares were purchased to be petitioners' nominees or alter egos (Pet. App. A15 n.8); the court of appeals affirmed that determination (*id.* at n.2).

2. Petitioners also argue (Pet. 11-15) that summary judgment should not have been entered on the issue of whether they had a duty to disclose material facts.⁹ This contention has no merit.

The district court properly found that petitioners had an affirmative duty to disclose material facts since petitioners shared a "relationship of trust and confidence" with the agents they used for the purchases, those individuals to whom they recommended the stock and Paulson (Pet. App. A19). Petitioners' duty to disclose also arose as a matter of law from their role—by virtue of their control of the entire offering—as participant underwriters (Pet. App. A20-A22). See *SEC v. Murphy*, 626 F.2d 633, 648-652 (9th Cir. 1980).¹⁰ Thus, they had a duty to disclose all material facts in the offering circular and an additional duty to disclose to Paulson, their co-underwriter.¹¹ Accordingly, petitioners

⁹Petitioners' undisputed knowledge of the "underlying facts" that were not disclosed establishes their scienter on this issue as a matter of law. "Failure to disclose that market prices are being artificially [manipulated] * * * is an omission of a material fact." *United States v. Charnay*, 537 F.2d 341, 351 (9th Cir. 1976).

¹⁰Petitioners argue (Pet. 11-12) that the Commission must show reliance upon, and damages from, their misrepresentations. Though reliance and damages may be relevant in a private action, they are not elements in a Commission action for injunctive relief. See *Aaron v. SEC*, 446 U.S. 680, 700-702 (1980); cf. *Hanly v. SEC*, 415 F.2d 589, 596 n.9 (2d Cir. 1969) (Section 17(a) of the Securities Act) (administrative disciplinary proceeding).

¹¹Petitioners assert (Pet. 15) that they were denied due process because the district court misled them into believing it would not decide the Commission's motion for summary judgment, but then granted the motion, thereby depriving them of an opportunity to introduce favorable evidence. This assertion is contradicted by the record. The Commission originally moved for summary judgment in August 1981 and renewed its motion on October 12, 1981; the court set oral argument on that motion, as well as on the preliminary injunction motion, for December 17. Between October 12 and December 17, petitioners filed no opposition to the summary judgment motion (Pet. App. A11-A12). During the oral argument, the court gave petitioners an additional

raised no question of fact regarding their breach of the duty to disclose their manipulations; further review by this Court is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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opportunity to bring disputed facts to its attention; petitioners failed to do so (Pet. App. A12 n.5). Moreover, after oral argument, petitioners made no attempt to bring any factual disputes they believed existed to the attention of the court before it filed its opinion (Pet. App. A24). Petitioners cannot now complain that they were deprived of the opportunity to submit evidence to oppose summary judgment.